



Memorandum

TO: RULES COMMITTEE

FROM: Councilmember Sam Liccardo
Councilmember Rose Herrera
Councilmember Pierluigi Oliverio

**SUBJECT: AMENDMENT OF TITLE 4 OF
THE MUNICIPAL CODE TO
PROVIDE FOR REVOCATION
AND INJUNCTIVE RELIEF
FOR NONPAYMENT OF CITY
FEES OR TAXES**

DATE: September 6, 2012

APPROVE

Sam Liccardo R.C. *Rose Herrera (A.Q.)*

Recommendation

Include within the Council prioritization process this Fall a directive to:

- (1) The City Attorney to amend Title 4.66 of the San Jose Municipal code to provide the City with the following remedies for unlawful non-payment of the General Business Tax (GBT) and Marijuana Business Tax (MBT) due by medical marijuana dispensaries under this section:
 - a. The revocation of any certificate or license issued under that Title; and
 - b. Injunctive relief for the closure of any dispensary unlawfully failing to pay tax.
- (2) In the event the City Attorney's office determines that Title 4.66 cannot be so amended, direct the City Attorney to amend Title 4 more generally to provide for the relief outlined above as to any business that fails to pay its taxes to the City.
- (3) Ensure that the ordinance changes include appropriate due process protections for subject businesses, such as criteria guiding the City's use of its discretion in seeking equitable relief, and procedures for appeal.

Analysis

Over the fiscal year ending June of 2012, the City of San José collected over \$3.5 million in MBT taxes from medical marijuana dispensaries. However, millions more were not paid. According to the Department of Finance, 80 of San José's 158 marijuana dispensaries paid either no tax or else paid taxes only sporadically. Admittedly, 34 of those filed a tax return with the City, but claimed that they had no tax to pay. Even that claim appears worthy of scrutiny, since such a filing implicitly claims that those 34 dispensaries have earned *no revenue whatsoever*, since the MBT is applied on gross (not net) revenues.

Of the 80 dispensaries paying none or only some part of their tax bill, 45 continue to operate today. We might reasonably expect to find dispensaries ignoring the city's regulations among those 45.

Many marijuana dispensaries have demonstrated a good faith commitment to fully comply with state and local laws. In fact, they share the frustration of City Finance officials because the lawless practices of their competitors put them at a financial disadvantage.

Measure U, passed by the voters in 2010, provides for various consequences for non-payment of taxes, (*see, e.g.*, S.J.M.C. § 4.66.300, 4.66.560, 4.66.600) but none of its provisions appear to empower the City to shut down the offending business. The remedies that Measure U do provide--including collection actions and the threat of unlikely criminal prosecution--seem largely ineffectual, as the evidence of high rates of tax avoidance suggests.

Two options lie before the City Attorney and this Council:

A. Amend Provisions Relating to Measure U

The most direct path to a solution would amend Section 4.66 of the Municipal Code to provide the City with the ability to enjoin violators and shut them down, and to any revoke relevant certificates or licenses. We've heard objections previously that the Council "cannot amend what the voters have created," but the text of Measure U explicitly provides that its provisions "may be repealed or amended by the city council without a vote of the people," except for "...any amendment provision that would increase the rate of any tax levied." Since we do not propose a tax increase, we can presumably amend the Municipal Code.

B. Create a Uniform Power to Enjoin Tax Cheats

In the event the City Attorney's office determines that Measure U cannot be amended in such a fashion, the Council should consider enacting a broader ordinance that empowers the City Manager to shut down any business--marijuana-related or not--for nonpayment of taxes and fees. A uniform law could serve the City's objectives more efficiently than our current approach to addressing nuisance-causing businesses. Evidentiary standards require labor-intensive efforts from police and the City Attorney to establish prosecutable nuisance cases, and we're clearly short of staff.

For example, a hotel on South First Street has served as a magnet of prostitution for several months, providing headaches to nearby residents. The City Attorney's office has devoted hundreds of hours to litigate a nuisance action against it. The same hotel failed to pay any Transit Occupancy Tax for years, and owed the City hundreds of thousands of dollars, yet the City could take no action to revoke the motel's business license for nonpayment of taxes. Rather, the attorneys have become embroiled in time-consuming litigation over nuisance issues, which can require extensive discovery, depositions, and evidentiary hearings.

These and other instances speak to the need for the City to provide a simple means to shut down business that constitute nuisances and fail to pay their taxes. Accordingly, we seek to add to the City's "toolbox" to shut down noncompliant, burdensome businesses.